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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Lorrie A. Garcia,

10 Plaintiff,

11 vs.

12 Regis Corporation, a Minnesota
13 Corporation d/b/a Cost Cutters Family
Hair; et al.,

14 Defendants.
15

No. CV09-1282-PHX-DGC

ORDER

16 Defendant moves for partial reconsideration of this Court's May 16, 2011 order
17 (Doc. 95). Doc. 96. Plaintiff moves to strike the motion.¹ Doc. 97. For the reasons that
18 follow, the Court will deny the motion for reconsideration and deny the motion to strike as
19 moot.

20 **I. Legal Standards.**

21 Motions for reconsideration are disfavored and should be granted only in rare
22 circumstances. *See Ross v. Arpaio*, No. CV 05-4177-PHX-MHM (ECV), 2008 WL 1776502,
23 at *2 (D. Ariz. Apr. 15, 2008). A motion for reconsideration will be denied "absent a
24 showing of manifest error or a showing of new facts or legal authority that could not have
25 been brought to [the Court's] attention earlier with reasonable diligence." LRCiv 7.2(g)(1).
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27 ¹ Plaintiff's request for oral argument is denied because Plaintiff was able to file a
28 written motion and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b);
Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998).

1 Mere disagreement with an order is an insufficient basis for reconsideration. *See Ross*, 2008
2 WL 1776502, at *2. Nor should reconsideration be used to make new arguments or to ask
3 the Court to rethink its analysis. *Id.*; *see Northwest Acceptance Corp. v. Lynnwood Equip.,*
4 *Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1988).

5 **II. Discussion.**

6 **A. Background.**

7 On March 9, 2011, the Court granted in part Defendant's motion for summary
8 judgment on Plaintiff's Americans With Disabilities Act ("ADA") claim on the basis that
9 Plaintiff had not raised a genuine dispute about being disabled under the ADA – specifically,
10 having a qualifying physical impairment, having a record of such impairment, or being
11 regarded by Defendant as having such impairment. Doc. 86. The Court also held that as a
12 direct result of Plaintiff failing to qualify as disabled under the ADA, Defendant was entitled
13 to summary judgment on the issues that its alleged acts constituted discrimination and created
14 a hostile work environment in violation of the ADA. *Id.* at 5-6.

15 Plaintiff moved for reconsideration of the Court's determination that she failed to raise
16 a genuine issue of being regarded by Defendant as having a qualifying physical impairment
17 (Doc. 90), and Defendant responded (Doc. 92). On May 16, the Court ruled in part that its
18 summary judgment order was in error on the "regarded as" issue, and vacated in part its
19 March 9 order. Doc. 95 at 9. The ruling extended to all issues based solely on the "regarded
20 as" holding, including the issues that Defendant's alleged discrimination and hostile
21 environment did not violate the ADA. Because Defendant's summary judgment motion
22 sought alternative grounds for holding that the alleged acts did not violate the ADA
23 notwithstanding Plaintiff's disability, and because the parties briefed these issues on
24 summary judgment, the Court necessarily had to consider these alternative arguments as part
25 of the motion for reconsideration. The Court did so and concluded as follows: (1) as to the
26 argument that Defendant did not fail to accommodate Plaintiff, Plaintiff raised a genuine
27 factual dispute about whether the accommodations were related to the impairment Defendant
28 regarded Plaintiff as having; and (2) as to the argument that Plaintiff failed to establish the

1 conduct was one that “a reasonable person would consider sufficiently severe or pervasive
2 to alter the conditions of employment and create an abusive working environment,” Plaintiff
3 raised a genuine factual dispute. *Id.* at 10-11. The Court did not rule that Plaintiff was
4 regarded as disabled, or that she was discriminated against, or that Defendant created an
5 abusive working environment – only that these questions should be decided by a jury.
6 Doc. 95.

7 **B. Analysis of Substantive Arguments.**

8 In its motion for reconsideration, Defendant first argues that the May 16 order
9 “decided issues that were not raised by plaintiff in her Motion for Reconsideration and were
10 never briefed by the parties.” Doc. 96 at 1. Although Plaintiff’s motion for reconsideration
11 did not expressly argue that judgment for Defendant on the discrimination and hostile work
12 environment issues should be vacated, this argument was implicit for four reasons: (1) the
13 March 9 judgment in favor of Defendant on these issues rested solely on the conclusion that
14 Plaintiff had not shown she qualified under the ADA; (2) Plaintiff’s successful challenge of
15 this conclusion would be moot if Defendant prevailed on the alternative arguments made in
16 its summary judgment motion as to these issues; (3) the Court did not and had no need to
17 consider these alternative arguments when ruling on the original motion for summary
18 judgment in light of its finding that Plaintiff did not qualify as disabled under the ADA; and
19 (4) Defendant would have been prejudiced if the Court merely vacated its judgment without
20 considering the alternative arguments made in Defendant’s original motion for summary
21 judgment.

22 As to whether the issues were “never briefed by the parties,” Defendant is in part
23 correct – but this undercuts the thrust of its argument for reconsideration. Defendant’s
24 motion for summary judgment did brief these issues by arguing as follows: (1) “[P]laintiff
25 cannot establish that Regis retaliated against her or failed to provide her with a reasonable
26 accommodation related to any disability. . . . [A]s evidenced by plaintiff’s own testimony,
27 this schedule request was not made to accommodate any purported disability. To the
28 contrary, plaintiff’s articulated reasons for this schedule change request had absolutely

1 nothing to do with her medical condition[,]” (Doc. 76 at 9:10-11, 10:17-19); and (2) “To
2 demonstrate cognizable harassment, a plaintiff must establish conduct which a reasonable
3 person would consider sufficiently severe or pervasive to alter the conditions of employment
4 and create an abusive working environment. . . . In the instant case, there is absolutely no
5 evidence that plaintiff was subjected to a hostile work environment[,]” (*Id.* at 12:21-25, 13:1-
6 2).

7 In addition, Defendant’s motion appears premised on Plaintiff failing to show she had
8 an actual impairment that qualified as a disability under the ADA. *See* Doc. 76. Plaintiff
9 responded that she qualifies under the ADA because, in part, she was regarded by Defendant
10 as being disabled under the ADA. Doc. 82. In replying, Defendant asserted that “Plaintiff
11 has not produced a scintilla of admissible evidence to establish a ‘regarded as’ claim under
12 the ADA” and proceeded to argue what relevant evidence was missing. Doc. 84 at 10-11.
13 Defendant’s reply did not argue that an employer has no obligation to accommodate a
14 “regarded as” plaintiff, nor was this argument made in its initial motion for summary
15 judgment.² Docs. 76, 84.

16 Defendant appears to argue that when reconsideration of a summary judgment order
17 is granted on one issue, and that issue necessarily requires reconsideration of other issues
18 raised in the motion for summary judgment, a court must order a re-briefing of the summary
19 judgment motion. Defendant has cited no authority in support of this argument. Nor has
20 Defendant moved for permission to file two summary judgment motions. Doc. 16 at 4 (“No
21 party shall file more than one motion for summary judgment under Rule 56 of the Federal
22 Rules of Civil Procedure unless permission is first obtained, by joint telephone call, from the
23 Court.”). Accordingly, the Court properly reconsidered the vacated portions of the summary
24 judgment order in light of the arguments presented in the parties’ initial summary judgment
25 briefings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (noting that a party seeking
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27 ² This argument also appears to be absent from Defendant’s response to Plaintiff’s
28 motion for reconsideration. Doc. 92.

1 summary judgment “bears the initial responsibility of informing the district court of the basis
2 for its motion . . .”).

3 In its motion for reconsideration, Defendant argues for the first time that Ninth Circuit
4 precedent, more specifically *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1233 (9th Cir.
5 2003), stands for the proposition that “there is no duty to accommodate an employee in an
6 ‘as regarded’ case.” Doc. 96 at 2 (quoting *Kaplan*). To the extent Defendant’s motion for
7 reconsideration tries to obtain summary judgment in its favor on the basis of a new argument,
8 it will be denied. See *Northwest Acceptance Corp.*, 841 F.2d at 925-26. Also, to the extent
9 Defendant seeks to finalize jury instructions on the law regarding employer duties to
10 “regarded as” employees under the ADA, the attempt is premature – the parties may do so
11 in connection with the final pretrial conference.

12 Defendant also requests reconsideration of the hostile environment ruling, under two
13 independent arguments: lack of duty under *Kaplan* and Plaintiff’s failure to establish a
14 sufficiently-severe or pervasive conditions under *Ellison v. Brady*, 924 F.2d 872, 879 (9th
15 Cir. 1991). The *Kaplan* argument is insufficient to warrant summary judgment for the
16 reasons mentioned above. The Court addressed *Ellison* in its May 16 order (Doc. 95 at 10-
17 11), and Defendant has not persuaded the Court that, in light of the parties’ summary
18 judgment briefings, the ruling was manifest error.

19 The motion to reconsider on these grounds will therefore be denied.

20 **C. Admissibility of Evidence.**

21 Defendant also argues, in the alternative, the Court’s suggestion that Defendant “did
22 not specifically identify Dr. Walter’s letter and prescription as inadmissible nor state the
23 grounds on which the evidence was admissible” is error that by itself requires
24 reconsideration. Doc. 96 at 3 n.1 (internal quotation marks omitted). Defendant notes that
25 “[i]n objecting to Plaintiff’s Statement of Fact . . . [Defendant] specifically cited lack of
26 foundation and inadmissible hearsay, as well as the fact that the exhibit on which plaintiff
27 relied failed to support the factual assertions contained in Plaintiff’s SOF ¶58.” *Id.*

28 The May 16 order states in part as follows:

1 A nonmoving party need not “produce evidence in a form
2 that would be admissible at trial in order to avoid summary
3 judgment,” . . . but the substantive evidence itself must be
admissible, *Orr v. Bank of America*, 285 F.3d 764, 774 (9th Cir.
2002).

4 The letter and prescription are not sworn statements and
5 are not submitted under affidavit by Plaintiff’s attorney.
6 Defendant’s reply contains a catch-all paragraph objecting to
7 admissibility of evidence, but Defendant does not specifically
8 identify Dr. Walter’s letter and prescription as inadmissible, nor
9 does it state the grounds on which the evidence in general is
10 inadmissible other than to cite generally to Rule 56 and Local
Rule 56.1. Accordingly, the Court finds that the above
documents, if appropriately admitted at trial after foundation is
established, do raise a genuine dispute about whether Plaintiff’s
need for a day shift was related to the impairment Plaintiff had
or Defendant regarded her as having.

11 Doc. 95 at 10.

12 Defendant’s summary-judgment reply refers to evidentiary defects generally,
13 specifically identifies several defects other than issues with Exhibit 16, and contains a
14 footnote asserting that “[t]he analysis of procedural infirmities is detailed more fully in
15 Regis’ Response and Objections to Plaintiff’s Controverting and Separate Statement of
16 Facts.” Doc. 84 at 2-4. Such statements in the reply memoranda do not comport with Local
17 Rule 56.1(e): “Memoranda of law filed in support of . . . a motion for summary judgment,
18 including reply memoranda, must include citations to the specific paragraph in the statement
19 of facts that supports assertions made in the memoranda regarding any material fact on which
20 the party relies in support of or in opposition to the motion.” Therefore, Defendant is not
21 entitled to relief on the basis of objections not referenced with specificity in the reply.

22 The Court would not, however, have reached a different outcome had the reply
23 complied with local rules. Defendant’s objections to Plaintiff’s statement of facts, filed on
24 the same day as the reply to its summary judgment motion, asserts in part: “Regis disputes
25 and objects to PSOF ¶ 58. Plaintiff has failed to provide any foundation for Exhibit 16 on
26 which she relies. . . . To the extent Exhibit 16 is being provided to prove the truth of the
27 matter contained therein, it constitutes inadmissible hearsay.” Doc. 85 at 9-10. The Court’s
28 March 9 order found Plaintiff failed to raise a genuine issue as to having an ADA-qualifying

physical impairment. As a result, Exhibit 16 will not be received at trial to prove the truth of the matter asserted – that Plaintiff had an ADA disability. Rather, Exhibit 16 will be received as evidence of Defendant’s state of mind – its awareness and belief regarding Plaintiff’s impairment. Such use of the exhibit does not depend on the truth of the matter asserted and therefore is not barred as hearsay. Fed. R. Evid. 801(c).³ Moreover, to the extent the foundation objection attacks authenticity of these documents, authentication is “satisfied by ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’” *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Evid. 901(a)). Plaintiff’s statement of facts asserts that “In May 2008, [Plaintiff] provided [Defendant] with a doctor’s prescription, and letter from Dr. Debra A. Walter, M.D.” (Doc. 83 ¶ 58), and Defendant does not deny receiving such a prescription and letter (Doc. 85 at 9-10). Whether the prescription and letter were in fact written by Dr. Walter (i.e., whether the documents in the exhibit are authentic) is not relevant to Defendant’s receipt of these documents. Defendant did not deny in the summary judgment briefing that it received the documents. Whether Defendant believed the medical assertions stated in the documents is a factual issue for the jury.

III. Conclusion.

Because the motion for reconsideration is denied, Plaintiff’s motion to strike will be denied as moot.

IT IS ORDERED:

1. Defendant’s motion for reconsideration (Doc. 96) is **denied**.

³Defendant may seek an appropriate limiting instruction with respect to Exhibit 16.

DATED this 15th day of June, 2011.

David G. Campbell

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